Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1220

DAVID A. WOOLDRIDGE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, David A. Wooldridge, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered in the above entitled case on December 23, 1974, affirming petitioner's conviction of the crime of conspiracy (18 USC Sec. 371), violation of provisions of the Securities Act of 1933 and the Securities and Exchange Act of 1934 as follows: 15 USC Section 77e, 15 USC Section 77q(a), 15 USC Sec 78j(b), and mail fraud (18 USC Section 1341).

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, before Lombard, Ely and Wright, Circuit Judges, filed December 23, 1974, is not yet reported but is printed in Appendix A hereto, infra, page 14.

A Petition for Re-hearing was filed with the Circuit Court of Appeals for the Ninth Circuit on February 5, 1975 out of time. On February 25, 2975 the Court of Appeals for the Ninth Circuit entered its Order permitting the untimely filing of said Petition. The Petition for Re-hearing was denied on February 25, 1975. A copy of the said Order is printed in Appendix B hereto, infra, page 22.

JURISDICTION

Jurisdiction to review the aforestated judgment of the Court of Appeals for the Ninth Circuit by Writ of Certiorari is provided by 28 USC Section 1254(2), this petition having been filed within 30 days of the Ninth Circuit's denial of the petition for rehearing.

QUESTIONS PRESENTED

A. Whether the Court of Appeals for the Ninth Circuit erred, under the rule of *Remmer v. U.S.*, 347 US 227 (1954), when it held that the trial court did not abuse its discretion when it refused to grant a new trial after an evidentiary hearing which established that during the trial the forewoman of the jury had conversed with the bailiff and a banker about matters related to the indictment because:

a. It effectively ruled that the government had rebutted the presumption of prejudice arising when such communications are shown, without questioning all of the jurors who may have been exposed to determine the issue of prejudice; and, having done so,

b. It ordered counsel not to interview any jurors beyond the three who testified at the hearing, thus depriving petitioners of any means of demonstrating that other jurors were influenced either by the conversation with the bailiff itself, or the forewoman's use of both conversations to support her position in deliberation.

B. Whether the conviction of the petitioner for violation of 18 USC 371, conspiracy, and certain substantive provisions, under an instruction of the court, printed in Appendix D hereof, infra, page 26 embodying the rule of *Pinkerton v. United States*, 328 US 640, violated the due process clause of the Fifth Amendment to the Constitution of the United States under the circumstances of this case.

STATUTE INVOLVED

Petitioner is not requesting the interpretation of any state or federal statutes.

STATEMENT OF THE CASE

Petitioner's conviction on the charges above stated arose out of a 25 count indictment alleging a conspiracy which contemplated a wide ranging scheme to defraud the public by the sale of unregistered stock of several shell corporations with minimal assets. It was alleged that petitioner and several others, including an experienced securities attorney, bought a controlling stock position in a "shell" corporation known as Empire Oil Company. The stock was delivered to and held by the attorney. Petitioner and the other convicted defendant solicited the sale of this stock to their friends to get the new business venture started.

The gravamen of the scheme was the merger into Empire and its successor Capital Holding Company, of several small shell corporations, each of which had between 10 and 25 stock-

holders, in transactions patterned to fit within the exemption from registration requirements of Section 5 of the Securities Act of 1933 (15 USC Sec. 77e) by Rule 133 of the Rules and Regulations of the Securities and Exchange Commission, 17 CFR Sec. 230.133. It was charged that the stockholders lists of these merging companies were padded with nominees of insiders of the corporation, including Robert A. Eisenberg, the then counsel for Capital Holding Company, and that these shares held in the name of insider nominees were subsequently distributed to the public in violation of Section 5, *supra*, by use of false and misleading statements about the assets and prospects of Empire and later, Capital. Among the indicted and unindicted conspirators were a Phoenix, Arizona business manager for one of the companies, a California attorney to Capital Holding Company, two New York attorneys who at one time or another represented Capital Holding or its merging enterprises, two Canadians who allegedly purchased part of the illegal stock distributed by petitioner and other co-conspirators and subsequently resold it to the public, various nominees or alleged nominees of inside or controlling persons who resided in New York and California, a California transfer agent, a Phoenix, Arizona securities broker, a Phoenix attorney, a secretary, a Phoenix accountant, a banker from San Diego, California and "diverse other persons to the grand jury both known and unknown." There was no evidence that all these people had ever been at the same place at the same time or that petitioner know many of them or their role in the conspiracy any more than there was evidence of the substance of even one conversation in which the scope or details of the scheme were discussed. The case went to the jury under standard jury instructions relating to conspiracy as well as the following language embodying the rule of *Pinkerton v. U.S., supra*.

> In connection with the counts I have mentioned, 2, 3, 6, 7, 9, 12, 14, 16 and 18, if you find that the particular act *(apparently with reference to the jurisdiction act of those counts)*, was committed as charged by at least one of the actors charged, then you may find any of the other defendants charged in that count as being guilty of the same crime on one of two alternative theories which I will explain in a minute.
>
> Now . . . the second theory is this – it is called the *Pinkerton* theory, and I think that word has been referred to in argument. If you find that the specific act was committed by one or more of the actors as charged and that the act was done in furtherance of the conspiracy – this assumes now that you have heretofore found a conspiracy to act as charged in count one – and if you find that the defendant in question was one of the co-conspirators at the time that the actor committed the specific act and might reasonably have foreseen that such act would be done by another member of the conspiracy, then you may find that such other non-actor defendant was guilty of the crime charged.

A post verdict Motion for New Trial was filed with the trial Court by reason of alleged misconduct of the forewoman of the jury. This Motion was supported by affidavits of two jurors as well as counsel for petitioner indicating that during the course of deliberations the forewoman told other jurors that she had done research concerning the law of the case outside the jury room and aside from the instructions of the court and that she made certain mis-statements of the law which she stated to have been derived from her prior experience and her research, all of which were relevant to a decision of the issues presented to the jury. All of this was denied by the forewoman by affidavit. The trial court, after hearing, found that where the facts were in conflict he believed the forewoman, that there was no misconduct, but that if there was it was not prejudicial.

Prior to the evidentiary hearing on these issues, trial counsel was specifically instructed by the trial judge not to contact or to interview any jurors besides the two who had submitted affidavits and the forewoman. On November 16, 1973, an evidentiary hearing was held concerning the misconduct issue at which the trial court addressed certain questions which had heretofore been submitted to it by counsel both for defendants and the government, in an effort to establish the facts of the

matter. During the course of said hearing testimony was adduced from the forewoman that she had, during trial, had a conversation with the court's bailiff concerning the permissibility under the law of borrowing from banks to purchase stock and that she had checked the bailiff's answer with a banker by phone. Her testimony as to these conversations is printed herein as Appendix C, infra, page 23. The forewoman, the other two jurors called to testify at the hearing, and the bailiff acknowledged that the conversation had occurred. All three jurors, however, indicated that their decision as to the guilt or innocence of the defendants, including petitioner, was in no way influenced by the statements made by the bailiff in response to the forewoman's question. After hearing, in addition to its findings set forth above, the trial court concluded that there was no error arising out of the conversation; that if there was error it was not prejudicial; and that therefore a new trial was not warranted. The court's findings and conclusions on this issue are printed as Appendix D hereto, infra, page 26. The Court of Appeals concluded that the trial judge had not abused his discretion in refusing to grant a new trial, citing as authority for that holding *Holt vs. U.S.*, 218 US 245, (1910), and *U.S. vs. Brumbaugh*, 471 F2d 1128 (6th Cir.), *cert. denied*, 412 US 918 (1973). In a concurring opinion Ely, Circuit Judge, specifically found that the conduct of the bailiff and the forewoman constituted error, but concurred with the majority, on the ground that neither the conversation between the forewoman and the bailiff nor her subsequent referral to the bailiff's answer during the course of deliberations affected either juror's determination as to guilt or innocence.

REASONS FOR GRANTING THIS WRIT

This Court is urged to grant its Writ of Certiorari to the Court of Appeals for the Ninth Circuit because the decision of the Circuit Court of Appeals concerning the issue of jury misconduct, which was appropriately raised before the Court, is

contrary to and in conflict with applicable decisions of this Court on that issue.

In this case there was clear evidence of a conversation held between the jury forewoman and the court's bailiff, Frank Torres, in which he indicated that it was improper to borrow money for the purpose of buying securities. This conversation was held directly with the forewoman, but within the hearing of the rest of the jurors. Although neither of the defendants were charged with a violation directly involving borrowing to purchase securities, there was evidence that at least Mr. Manning had done this, and the matter was discussed during deliberation.

This Court's rule concerning conversation between jurors and court personnel is stated in *Mattox vs. United States*, 146 US 140 (1892), wherein this Court said:

> Private communications, possibly prejudicial between jurors and third persons, or witnesses, or the officer in charge are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.

This rule was expanded by this Court in *Remmer vs. United States*, 347 US 227 (1954) in which, after the verdict was in, counsel for defendant became aware that during the trial a third person had indicated to the jury foreman that he could profit by bringing in a verdict favorable to the defendant. The District Court denied defendant's motion for new trial without hearing. In remanding the case to the District Court for an evidentiary hearing to determine whether the extrajudicial contact with the juror was prejudicial to defendant this Court said:

> In a criminal case, any private communication, contact or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury, is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and in the instructions and directions of the court made during the trial with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the government

> to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. *Mattox vs. United States*, 146 US 140, 148-150, 13 S Ct 50, 52-535, 36 L ed 917; *Wheaton vs. United States*, 8th Cir., 133 F2d, 522, 527.

This has been the rule of this Court since 1898, and has never been materially abridged. See, e.g., *Gold v. U.S.*, 352 US 985, (1957). The rule has also been cited, with no significant linquistic changes, almost universally in the circuits. See e.g., *Wheaton vs. United States*, 133 F2d 522 (CA 8, 1973), *Stone vs. U.S.*, 113 F2d 70 (CA 6, 1940), *U.S. vs. Sorcey*, 151 F2d 899 (CA 7, 1945), and *Ryan v. U.S.* 191 F2d 779 (D.C. Cir. 1951).

There is no question that the conversation between the court's bailiff and the forewoman of the jury, in the presence of other jurors, was held. As to allegations that the forewoman looked up the securities law in a book at home during the trial, her denials are in direct conflict with the testimony of the two jurors at the evidentiary hearing. The Court's finding that he believed the forewoman as opposed to the other two jurors (R. 4920), is contrary to the weight of the evidence, and is clearly an abuse of discretion, particularly in the light of the Court's refusal to call nine witnesses known to have been present at the time the statements were allegedly made. There remains, therefore, a substantial likelihood that the statement regarding her research, as well as some uninstructed, extraneous, and incorrect statements of law, were made during deliberations. That extraneous matters were introduced into the jury room has been clearly established, and thus too the legal presumption that defendants were prejudiced, so that the only remaining question is whether the government met its burden of establishing lack of prejudice.

It is manifest that it has not met that burden. The writer has been unable to find any case in which either this Court or

a court of appeals has ruled that the presumption of prejudice has been rebutted without at least an interrogation of all the jurors who came in contact with the extraneous matter. On the contrary, all of the circuit cases reviewed indicate that all of the jurors who came in contact with the extrajudicial statements were interviewed. See, e.g., *Miller v. U.S.*, 403 F2d 77 (2nd Cir. 1968), *Gold vs. U.S.*, *supra*, *Stone vs. U.S.*, *supra*.

The cases don't state this rationale in terms of a hard and fast rule, but petitioner submits that this is only because it is so obvious that the only common-sense way to ascertain whether *any* of the jurors was influenced is to examine *all* of them. Petitioner therefore asserts that the Court erred when it refused to examine the rest of the jurors, and then foreclosed any possibility that the issue would be fully and fairly aired by denying counsel's motion for permission to communicate with the remaining jurors. The trial court's lack of interest in proceeding on a sound judicial basis is reason enough to reverse, but preventing anyone else from curing the Court's default flies in the face of the long established judicial tradition of basing findings of fact on all available evidence.

Unlike many of the reported cases, this is not a case where some extraneous matter wholly incidental to the trial was presented to the jury. It is a case where the forewoman supported her position in deliberations by reference to her study and extraneous information gleaned from the bailiff and a banker (R. 4892). The reasoning of the New York Court of Criminal Appeals set forth in *People vs. Crimmens*, 307 NYS 2d 81, (1969), a case in which three jurors made an unauthorized visit to the scene of the crime, is particularly apposite; the court held that inasmuch as three of the jurors had visited the scene of the crime they in effect became "unsworn witnesses" against the defendant, who was not aware of the visits and who was given no way of testing the jurors' observation nor any opportunity to diminish or eliminate false impressions.

In light of all of the foregoing, petitioner urges this Court to issue its Writ of Certiorari to the Court of Appeals for the Ninth Circuit.

II.

This Court should issue its Writ of Certiorari to review the second question presented by petitioner because the increasingly more common application of the *Pinkerton* doctrine in complex, wide ranging conspiracy cases such as this is an egregious departure from due process and fair prosecution. Its use in such cases has, when coupled with the evidentiary and legal implications of the conspiracy charge itself, allowed the government to create a method of indictment and trial in which it can convict without having to prove criminal acts, and in which meaningful defense is impossible. The problem can be amply shown by analysis of the indictment and jury charge in this case.

The allegations of paragraphs one through seven of count I are all in the conclusory language of the statutes charged. Only in paragraph eight (the objects of the conspiracy and the means by which it was carried out), and paragraph nine (the alleged overt acts) are the allegedly criminal acts of petitioner described. More important, all of the substantive counts of which petitioner was convicted refer directly or indirectly to paragraph eight of count I for a description of the criminal conduct charged in the substantive counts. In addition, each count contains a "jurisdictional act" alleged to have been committed by one or more of the defendants charged in the first paragraph of each substantive count. Hence, what we have is the 14 sub-paragraphs of paragraph eight of count I tortured into a 36 page- 25 count indictment.

What conduct is described in that paragraph? Sub-paragraphs (a) through (i) describe activities which are entirely lawful if done in compliance with the regulations of the S.E.C. and without an intent to violate the law. Sub-paragraph (g) does not refer to petitioner. It was not proven that petitioner did

any of the acts charged in sub-paragrpahs (k) and (l) except that he was present when the financial statement was delivered to stockholders who already owned stock in Empire. Sub-paragraph (m) is merely a recital of the language of the statute, and sub-paragraph (n) doesn't specify who said what, where, or to whom. The evidence did show that petitioner made the statements in sub-paragraphs (n)(4), (6), and (7), but counts XVIII and XIX charging jurisdictional acts related to those statments were dismissed by the government under the doctrine of *Levine vs. U.S.*, 383 US 265 (1966), ironically "to avoid an overextension of the *Pinkerton* doctrine.

None of this alleged conduct is, without more, illegal. It becomes illegal *only* if done under circumstances which violate the Securities Act and the convoluted, hypertechnical regulations of the Securities and Exchange Commission which, we have on good authority, are "far from a model of clarity." *U.S. v. Crosby*, 294 F2d 918 (2d Cir., 1961). Insofar as he was guilty of any of this conduct, petitioner claimed that he relied on the advice of competent counsel whom he was unaware was involved in a criminal conspiracy.

The government, with the aid of the Congress, has forged a method of making such conduct grounds for criminal prosecution. The raw material is 18 USC Sec. 371 — CONSPIRACY. All that is required is more than one person engaged in activities tending in the same general direction. The court in this case instructed the jury in the following, universally accepted particulars (R. 4614-4617):

> It is not necessary that the people met together and entered into any express or formal agreement or that they stated in words or in writing what the scheme was or how it was to be effected. It is sufficient to show that they tacitly came to a mutual understanding to accomplish an unlawful act; such an agreement may be inferred from the circumstances of and the conduct of the parties, since ordinarily conspiracy is characterized by secrecy. . . . [T]o be a member of a conspiracy defendant need not know all the

> other members nor all the details of the conspiracy, nor the means by which the objects of the conspiracy were to be accomplished. . . . The extent of a particular defendant's participation is not determinative of his guilt or innocence. . . . Defendant may be convicted as a conspirator even though he plays a minor part in the conspiracy. . . . [I]t is not necessary for you to find that all of the alleged overt acts were committed so long as you find one overt act as charged was committed in this judicial district, the Central District of California.

With the benefit of that instruction, the government having done nothing more than *charging* a conspiracy to violate the securities and mail fraud laws, and showing the performance of lawful acts which had the incidental effect of furthering the purported objects of a "scheme," can obtain a legal verdict and send petitioner to a penitentiary for four years without directly proving that an *illegal* scheme existed and that petitioner was consciously a part of it.

But that's not all. By having "proven" that petitioner "conspired to commit an offense," the government establishes the requisite intent to make all the lawful conduct used to prove the conspiracy criminal. Hence, it relies on those acts, so far as they were performed by petitioner, to obtain his conviction on substantive counts.

At this point the *Pinkerton* doctrine comes into play. Prima facie "evidence" of conspiracy having been adduced, the court went on to instruct that petitioner could be convicted of any substantive count charging any other co-conspirator with any act which was performed in furtherance of the conspiracy so long as such conduct "might reasonably have been foreseen" by petitioner.

Thus, as to no substantive count do we know the precise conduct set forth in paragraph eight of count I for which petitioner is being punished, any more than we know who committed it. He has been made vicariously responsible for the conduct of 22 people, living in several states and a foreign country, some of whom he didn't even know.

Though conspiracy prosecutions have been criticized (see e.g. the dissent of Mr. Justice Frankfurter in *Nye and Nisson v. U.S.*, 336 US 613 [1949]), they have their place in American jurisprudence. So does the doctrine of *Pinkerton vs. U.S., supra.* However, this Court should not tolerate convictions of defendants for substantive offenses in the Federal Courts upon the tortured, fictional, and circular methods employed in this case. In the context of this case the jury cannot be blamed for overlooking the dictate of *U.S. vs. Falcone*, 311 US 208 (1940) that membership in a conspiracy may not be shown by acts which further it unless the actor knew of its existence. The bulk of the evidence, the complexity of the statutes and regulations embodied in the conspiracy, and the other instructions which whittle away at the effect of the *Falcone* instruction, were enough to nullify its effect. Nevertheless, petitioner has been denied due process by the applications of the *Pinkerton* theory of vicarious liability in this case because of its integral part in the circular theory under which he was convicted. This Court should, by review of the judgment of the Circuit Court by Writ of Certiorari, limit the use of this doctrine to cases where the conspiracies charged involve a limited number of actors and embrace a limited illegal purpose which is clearly defined. *Pinkerton* has no place in ambiguous, technical, and multi-faceted prosecutions for conspiracy to violate the securities laws.

CONCLUSION

For the reasons stated, petitioner respectfully submits that his petition for writ of certiorari should be granted.

Respectfully submitted,
Meredith, Barber and Day
O. Robert Meredith
James N. Barber
Richard M. Day

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DANIEL E. MANNING and
DAVID A. WOOLDRIDGE,
Defendants-Appellants.

No. 74-1095
No. 74-1341

OPINION

Appeal from the United States District Court for the Central District of California

Before: LOMBARD, ELY and WRIGHT, Circuit Judges.

WRIGHT, Circuit Judge:

Appellants were convicted of conspiracy and multiple counts of violating the registration and anti-fraud provisions of the Securities Act and Exchange Act and mail fraud. They argue that their convictions should be reversed because of prejudicial jury misconduct, erroneous instructions to the jury, delay in production of exculpatory material, insufficient evidence, reliance on the advice of counsel, and delay in the bringing of indictments against them. We affirm.

Appellants were participants in a wide-ranging scheme to defraud the public by the sale of unregistered stock of several shell corporations with minimal assets. The unregistered stock was sold on the basis of false and misleading statements as to the actual assets and prospects of the corporations involved. Although eight persons were indicted for this conspiracy, only

five stood trial. The remaining three, including Robert A. Eisenberg, the purported counsel of the appellants, were at the time of the trial fugitives of foreign countries. Of the five who tried, only the appellants were convicted; charges against the other defendants at trial were either dismissed or resulted in verdicts of acquittal.

A major element of the scheme was the attempt to shield the sale of unregistered stock under then Rule 133 of the Securities and Exchange Commission, 17 C.F.R. S 230.133. Appellants distributed the stock of their two shell corporations, Empire Oil and Capital Holding, through purported shareholders of corporations which supposedly were acquired in merger transactions. Had such mergers actually taken place and had the distributees in fact been shareholders of the merged companies, Rule 133 would have permitted sales of the stock received to the general public, despite the lack of a registration statement. Such sales could not have been made if the purpose of the entire transaction had been in fact the sale of such unregistered stock.

By padding the shareholder lists of Empire Oil and several corporations they purportedly acquired through merger, appellants sold unregistered Empire Oil and Capital Holding stock to the public, using friends, innocent third parties and fictitious persons as "stockholders" and conduits.

Sales of such stock were halted by the S.E.C. on January 15, 1969. The acts comprising elements of the charged conspiracy ended on December 31, 1969. A Criminal Reference Report of the S.E.C' was transmitted to the Deaprtment of Justice in October of 1971, the issue was referred to the U. S. Attorney in March of 1972 and the indictments were returend by the Grand Jury on February 14, 1973.

Appellants were sentenced to four years on the conspiracy count and to two years on each of several separate counts, the latter sentences to run concurrently with each other but consecutively to the conspiracy sentence. Appellant Wooldridge was fined $10,000 on the conspiracy count while Manning was fined $8,000 on the conspiracy count and $2,000 on an anti-fraud count.

Appellants claim that the trial judge erred in refusing to grant a new trial after several jurors reported alleged misconduct on the part of the forelady. The judge held an evidentiary hearing, questioned the jurors involved, and concluded that no prejudice to the defendants resulted from the conduct of the juror in question. We find no abuse of discretion on the part of the judge in refusing to grant a new trial. *Holt v. United States*, 218 US 245 (1910). *United States v. Brumbaugh*, 471 F2d 1128 (6th Cir.), *cert. den.* 412 US 918 (1973). No error was involved in relying on questions submitted by counsel rather than permitting them personally to cross-examine the jurors. *United States v. Handy*, 454 F2d 885, 892 (9th Cir. 1971), *cert. den.* 409 US 846 (1972).

The appellants argue that the trial court erred in refusing to accept their proposed instruction with respect to the vicarious liability of co-conspirators. The judge's instructions in this respect were proper. First, the proposed instruction[1] is not a correct statement of the holding in *Kotteakos v. United States*, 328 US 750 (1946), since it precludes any liability except for acts in which they "knowingly and willingly participated." *Kotteakos* held that it was error for the judge to instruct that conspiratorial liability could be premised on the overt act of any defendant when the underlying acts involved separate and independent conspiracies involving only a single central figure. This holding did not undercut the settled rule that a co-conspirator could be held liable for reasonably foreseeable acts

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[1] Defendants' requested instruction No. S14:

"You may not attribute these acts of Robert Eisenberg to the Defendants in this case unless you have knowledge that they knowingly and willingly participated with him in accomplishing these acts."

committed in furtherance of the common illegal objective. *Pinkerton v. United States*, 328 US 640 (1946).

Second, given the strong evidence of a single, unified conspiracy, the instruction of the judge was proper. *Blumenthal v. United States*, 322 US 539 (1947); *United States v. King*, 472 F2d 1 (9th Cir.), *cert. den.*, 414 US 864, *reh. den.*, 414 US 1033 (1973).

Appellants also argue that the evidence was insufficient to sustain their convictions. A careful review of the evidence indicates that there was substantial evidence to support the jury's verdict on the general conspiracy charge and on count IX where the evidence of the appellants' fraudulent conduct is overwhelming.[2]

The appellants' contention that the government failed to prove willfull violation of the registration and antifraud provisions of the Securities and Exchange Act is without basis. See *United States v. Murdock*, 290 US 389 (1933), *United States v. Custer Channel Wing Corporation*, 376 F2d 675 (4th Cir.), *cert. den.* 389 US 850, *reh. den.* 389 US 998 (1967).

The assertion that the appellants' actions were immunized by reliance on the legal advice of their alleged co-conspirator Eisenberg misreads the law in this respect. *Bison v. United States*, 299 F2d 711 (9th Cir. 1961), *cert. den.* 370 US 952 (1962). Their actions in utilizing fictitious stockholders and nominees negative any claim that they thought they were acting lawfully. Moreover, it appears from the evidence that they did not treat Eisenberg as an independent, unbiased legal advisor. *United States v. Piepgrass*, 425 F2d 194, 198 (9th Cir. 1970), *United States v. Shewfelt*, 455 F2d 836, 839 (9th Cir.), *cert.*

[2]Since the sentences for the substantive counts were identical and were to run concurrently, we need not examine the evidence adduced in support of the other counts. *Jordan v. United States*, 416 F2d 338 (9th Cir. 1969), *cert. den.* 397 US 920, *reh. den.* 397 US 1018 (1970); *Benton v. Maryland*, 395 US 784, 791 (1969).

den. 406 US 944 (1972). Similarly, their claimed lack of knowledge about the provisions of the securities law provides no defense here. *United States v. Wolfson*, 405 F2d 779 (2d Cir. 1968), *cert den.* 394 US 946 (1969).

The exclusion of testimony of Alex Chaplin was proper since it was not relevant to the issue before the court. Mr. Eisenberg's persuasiveness in other business dealings is not material to the question of the complicity of the appellants in the conspiracy actually before the court.

It is further asserted that the prosecution improperly delayed in providing appellant Manning an opinion letter by Eisenberg until shortly before trial, citing *Brady v. Maryland*, 373 US 83 (1963). The letter indicated that certain Empire Oil shares were exempt from registration. Similar letters were introduced as part of the prosecution's case. In light of the discussion, *supra*, of appellants' claim of good faith reliance on advice of counsel, this material cannot be construed as exculpatory. In any event, appellants have failed to show that they were in any way prejudiced by the delay in production of the letter.

Finally, the appellants argue that their right to a speedy trial and due process rights were violated by the three-and-a-half-year delay between the acts constituting their conspiracy and their indictment. The Supreme Court has held that a similar delay did not violage defendants' rights:

> [T]he Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes "accused," an event that occurred in this case only when appellees were indicted. . .

United States v. Marion, 404 US 307, 313 (1971).

In stock selling schemes of complexity and magnitude, such as the scheme disclosed by the record of this case, considerable time is necessarily involved in assembling and verifying all the evidence which may be relevant to the government's decision to prosecute those thought to be culpable.

Appellants have failed to show that the length of time between the conspiratorial acts and indictment has prejudiced their defense, or has involved harassment, or was the intentional ploy of the prosecution to gain a tactical advantage. *United States* v. *Erickson*, 472, F2d 505, 507 (9th Cir. 1973).

The judgment of the district court is

AFFIRMED.

USA v. MANNING AND WOOLDRIDGE, Nos. 74-1095, 1341

ELY, Circuit Judge (Concurring):

I concur in my Brother Wright's majority opinion. At the same time, however, I feel obliged to express my concern over the misconduct of one of the jurors, as well as that of the District Court's bailiff. The district judge properly and repeatedly admonished the jurors that none of them was to discuss the proceedings with any other person prior to the submission of the cause for their deliberation. Notwithstanding, the forelady of the jury apparently defied the court's admonition.

At a post-trial hearing on the question of jury misconduct, the forelady admitted that she asked the court's bailiff early in the trial whether one could borrow money from a bank to buy stock. The bailiff answered to the effect that he thought not.[1]

[1]The bailiff's testimony concerning his conversation with the forelady was as follows:

"BY THE COURT:

Q Mr. Torres, did you, during the pendency of this case, have any conversation with Mrs. McDonald on any subject involving securities, or otherwise akin to the subjects being discussed in the case?

A I had a conversation, your Honor, with her, but not in regard to this matter on trial.

* * *

Furthermore, at some other time during the trial, the forelady had telephoned a bank office to make the same inquiry.

The forelady apparently believed that the answers to her questions were in some way related to the legal issues in the trial. At the jury misconduct hearing, two of the other jurors testified that during the course of the jury's deliberations, the forelady mentioned the bailiff's answer to her question.[2] When the district judge asked the forelady whether she had mentioned the bailiff's opinion during deliberations, she replied that she could not remember.

While the indiscretions of the forelady are deplorable and, in the light of the judge's admonitions, inexcusable, I have concluded from my reading of the entire transcript of the post-trial hearing that the forelady's actions did not likely affect the jury's ultimate determinations. Both of the jurors who testified about the forelady's conversation with the bailiff and her later mention of the conversation during jury deliberations insisted very positively that their decisions as to the guilt or innocence

Q Okay. Can you now relate to us what the forelady said, what you said, and what anybody else said in that conversation.

* * *

A She says, 'Frank, can I ask you a question?' She says, 'It has nothing to do with this case at all.'

I said, 'The answer is "No," but go ahead.'

She said, 'Can you go to a bank to borrow money to buy [stock]?'

And I said, 'I don't know.' I says, 'I can tell you what happened to me about ten years or more ago. I went to my credit union and told the man I wanted to borrow 100 percent money to buy 100 percent stock. He says, "You can't do it."'

I says, 'That is all I can tell you.' And that was the extent of that conversation at that time. "

[2]One juror testified as follows:

"BY THE COURT:

Q Do you remember any statement by the jury forelady

of the defendants on the offenses charged in the indictment were wholly unaffected by the forelady's comments. Consequently, I agree with my Brothers that the trial court's refusal to grant a new trial because of jury misconduct did not constitute an abuse of the court's decision.

I am confident that the district judge has taken such necessary measures as to assure that the court's bailiff will not again commit such an indiscretion as he so thoughtlessly committed during the trial of this case.

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about a conversation with Frank Torres, our bailiff, on any matter of securities?

A Yes. They were talking – I didn't hear the whole conversation. I believe they were talking about lonas, taking a loan from a bank to borrow securities being illegal.

* * *

Q Was any reference thereafter made to that conversation?

A Yes. Later in deliberations she made a reference. 'Well, when I was talking to Frank about it, even he said –

It was on some of the lonas that were taking out by the defendants for the corporation, and at the time of the conversation ***[another juror]*** said, 'Well, you can't talk about the case,' you know. And she says, 'Well we are not. That has nothing to do with the case.'

So we dropped it. Then later in deliberations she mentioned it, and right away ***[another juror]*** said, 'Well, I thought you said that had nothing to do with this case.'

She says, 'Well, I was just referring to them borrowing money and then putting it into securities,' you know, which to her was illegal.

Which I said, 'I don't know. It was not mentioned in court. I don't know if it is or isn't.'

Q In essence you said, 'Whatever wasn't mentioned in court we have to forget about it.'

A. Yes."

The other juror's testimony was similar:

"BY THE COURT:

Q ***What, if anything, did the forelady tell you about the possible illegality of selling securities of a company that has no assets?

A Well, that is where the borrowing money thing came in. She had told us that – we were discussing Mr. Manning's borrowing money to put into the company from banks, and she had a discussion before deliberation with Frank, the bailiff, about borrowing money to put into securities, was it illegal –

Q With whom?

A With Frank, the [bailiff] *** She was talking to him one day before we went into deliberations about it being illegal to borrow money to buy securities. And I tole her, and ***[another]*** juror also told her, 'We don't think you ought to be discussing that.'

She said, 'It has nothing to do with this case.'

But then during deliberations she brought that up, Frank had said such-and-such. And I told her, 'I thought you said that had nothing to do with the case when you were discussing it.' "

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	No. 74-1095
v.	No. 74-1341
DANIEL E. MANNING and DAVID A. WOOLDRIDGE, *Defendants-Appellants.*	ORDER

Before: LOMBARD, ELY and WRIGHT, Circuit Judges.

The clerk is directed to file the untimely petition for rehearing.

The petition for rehearing is denied.

The mandates in these appeals are recalled from the district court and reissuance by this court will be withheld pending appellants' timely filing of a petition for certiorari with the Supreme Court within the time required by law.

APPENDIX C

TESTIMONY OF FOREWOMAN:

Q Do you recall any conversation with Frank Torres, the bailiff here, –

A Yes.

Q – about the borrowing of money to buy securities that you might have had at any time during this trial?

A Yes. There was a discussion in the jury room about automobile loans, as I remember it started off. This is early in the trial.

Q Can you pinpoint it? How early?

A Oh, –

Q Very early?

A Very early.

Q All right. If you can be any more exact tell us. Otherwise –

A Well, I would say – well, I would say the first week or –

Q First day or two after you were sworn, something of that sort?

A The first week of the trial.

Q Okay. Go ahead.

A There was a conversation in the jury room about automobile loans, and someone said, "Well that is fine. You can buy stock with that kind of a loan."

I says, "Oh, no," I says, "you cannot buy stock. You cannot get a –" no. I said – in fact, I said, "You cannot get a loan to buy stocks."

I had had an experience in 1950. I wanted to buy stocks and I wasn't allowed to –

Q This came from your own experience?

A My own experience.

Q And general knowledge.

A Yes, indeed.

Q Okay.

A So I expressed that. I said, "Well, you are not allowed to get a loan to buy stocks. It was my experience in – when I worked for the Exchange, I wanted to buy some stock. Well, anyway, I was turned down for the obvious reason I didn't have collateral to put up for it, for the loan." Anyway – so, I remembered that, and mentioned that.

It piqued my curiosity, so I said, "Well, I will try it again." So I called the bank, and I said, "Well, can I take a loan – can I get a loan to buy stock?"

And he did say yes I can, provided I had collateral to back up the loan, of which they would give me 35 percent of my collateral.

And I did go back into the jury room and say that I had made an error in that I would – I am allowed to take a loan to buy stock provided I had adequate collateral.

Q Now, did you talk to Frank Torres about that subject?

A Yes, I did.

Q Tell me what you said to him and what he said to you, as best you remember.

A Well, the conversation – in fact, I was quite adamant on it, in saying that you cannot get a loan from the bank to buy stock. And then I wasn't really listening too well. I guess I was

concentrating every minute I had on my notes, I guess. And then I believe the next day I also told him –

Q Meaning Frank?

A To Frank, that I was wrong, and that I now find out that I can take a loan from the bank to buy stocks. That is the essence of the converstaion.

Q Do you remember what, if anything, he said about his own experience or any other phase of that matter?

A I don't. I am not terribly sure whether he suggested he thought it was possible. I really don't remember. It wasn't an important conversation to me, actually.

Q And did the subject of your prior discussion with Frank, and anything he may have said, come up later in deliberations, to you memory?

A Not at all. In fact, all – I mean, I don't know of any conversations with Frank that – not at all.

Q Very well.

A I mean, there was a lot of conversation, but none, you know – idle conversation.

Q I am just saying if you can remember your mentioning to the other jurors in deliberations a talk you had with Frank, what Frank may have said.

A I don't remember. I mean – in fact, I talked very little to Frank, as I remember.

THE COURT: Okay. We will let you go back, if you would, to the witness room.

THE WITNESS: Thank you.

(Witness excused.)

APPENDIX D

LOS ANGELES, CALIFORNIA, FRIDAY, NOVEMBER 16, 1973, 2:00 P.M.

THE COURT: Defendants are present with their counsel. Counsel for the Government are present.

Let me start out with some general observations. First, it is evident that we have here a clash of personalities between the two jurors, Bonando and Wright – particularly Bonando – and the forelady, Mrs. McDonald.

It may not appear on the printed record so I think I should say that the two complaining jurors, Bonando and Wright, were, in my memory, the two youngest members of the jury. They appear to be in their twenties, or perhaps early thirties. They are animated and outgoing people. Mrs. McDonald, on the other hand, is a much older woman, perhaps even old enough to be thier mother. I do not assert expertise on the age of women; but this is only my guess. Mrs. McDonald is quite mature and precise in her manner, and the generation gap has shown here, as it has in many other aspects of life. The animus of the two younger ladies, but particularly Bonando, to the way or method of Mrs. McDonald used in conducting the deliberations comes through loud and clear.

It should not be forgotten in looking at this whole situation that this was a long and arduous case, something like 35 days overall, and something like nine or so days on which deliberations occurred. I may not have those figures exactly right, but they are close. We had a case involving four defendants, eight or so lawyers as I remember, and it was energetically contested. There were many counts. The jury had – again I am speaking from memory – fifty or more matters to decide. And there were hundreds of exhibits – maybe thousands, if you

break an exhibit down into its sub-parts. There may have been even thousands of documents.

Now, when you ask laymen to undertake a task like that, and when a group of laymen who have not previously known each other are forced to be together so long undertaking so hard a task, personality conflicts are almost sure to emerge and become aggravated as the case goes on longer and longer.

You know, gentlemen, if we were allowed to overhear or take an electronic surveillance of what the jury said in the deciding of a case of this kind, or if we took the time and effort to investigate everything that was done and said by them in the jury room, we could find many things, I am sure, that one might criticize, or that someone might say could or should have been done better.

I believe in the jury system. I felt, and still feel that this jury was extraordinarily attentive, extraordinarily conscientious, extraordinarily intelligent and extraordinarily fair.

Where there is any material conflict in the factual matters that have been aired, I believe Mrs. McDonald's version. It is clear to me that she looked up no law and made no assertion of having done so. But even if she did so assert, it did not and could not reasonably overbear on the judgment of any juror, or be reasonably calculated to prejudice or affect their consideration of the evidence as to each defendant on each count under the facts of the case and under my instructions of law. Any misstatement that Mrs. McDonald may have made, even colorably improper conduct, if it occurred, was promptly taken up and its effects countered by these other jurors — particularly Bonando — who were, it appears, quite interested in finding fault with her and the way she was doing things. And any such conduct was thereupon stopped, such as the taking of notes home, or these desultory conversations with the bailiff Mr. Torres.

On that subject I believe the bailiff's version of those conversations with Mrs. McDonald; and I find that her version is not in conflict with Mr. Torres' version. And I find that conversation and those matters, and anything said about it, to be totally irrelevant — even if she adverted to it, which she denies. Even if she adverted to it incidentally in the deliberations, it is not an extraneous legal matter of the type and gravity which would, either alone or with any other matters raised, entitle this verdict to be impeached.

Most, if not all, of the other matters alleged to have occurred fall within what is called the general knowledge or personal experience category and are not of the type of gravity which could reasonably affect the deliberations of the jury.

Let me fill in and particularize findings and conclusions on certain aspects of the matter. These are additional to the findings and conclusions that I have heretofore made this afternoon.

First, as to Mrs. McDonald's previous experience at Shearson Hammill, I find that she did not falsify on this subject on the voir dire, and that nothing she said in reference to her experience could conceivably be said to be misconduct or prejudicial to the defendants. In any event, the defendants' failure to check out her experience, or seek to have it checked out during the voir dire, is a waiver of any right to object to her utilization of this experience in her discussions of the matter during deliberations.

Secondly, as to the charged of Mrs. McDonald's statements about State securities law, and particularly permits, all of the witnesses recognized, and my instructions of law made it clear, that the defendants were not on trial for anything not charged against them in the indictment; they were not on trial for any violation of State law; and that the jury were not to be concerned with whether these defendants or anybody else had

violated any other law other than the particular federal laws charged to have been violated in this indictment.

I find that the discussions of State security law were not jury misconduct. Alternatively, even if they are deemed to have been misconduct, they were not prejudicial to any defendant. State permits were a part of the evidence and discussions in the case; and, as I have said, if they were discussed – which it was natural that they should be – no misconduct, and certainly no prejudicial misconduct, occurred in connection with it.

Next, on the item of taking notes home, I find that this was not misconduct. It was completely harmless; and it ceased after if was called to Mrs. McDonald's attention.

Next, as to Mrs. McDonald's alleged statements concerning trading in the stock of a corporation without assets, trading in the stock of a corporation whose stock had been suspended as to trading, and taking stock in the name of a nominee, I treat all of these matters, all three of them, together. Any observations of statements which she may have made on these subjects were from her personal knowledge and general experience.

I find, as she has stated, that Mrs. McDonald did not assert these opinions as superseding or affecting in the slightest the binding effect of the court's instructions of law.

It is clear that none of these three matters that I have mentioned was an element of any of the crimes of which either defendant was convicted. I find that the assertions on these three subjects, if they occurred, would not constitute misconduct, and would not affect any reasonable juror.

As to suspended securities, these discussions, according to the evidence, involved only the defendant London, who was acquitted on all counts, and the convicted defendants cannot complain or seek impeachment of the verdict in the light of that fact.

As to nominees, the evidence indicates, and I find, that this discussion was in reference to defendant Mydanick, who was likewise acquitted of all charges, and these defendants cannot complain and were not prejudiced as to that.

To summarize, gentlemen, I find the facts as indicated in my remarks since the noon recess. I find that even if the facts are as alleged by Bonando and Wright, I find them not to constitute misconduct as the term is defined in the case.

Thirdly, even if the facts occurred as they, Bonando and Wright, assert may be said to constitute misconduct, I find them not prejudicial and, thus, those facts alone or together would not entitle either defendant to a new trial.

Even if I am wrong, and the facts are found as asserted by Bonando and Wright in all respects, these facts, as I have stated, do not and cannot impair the conviction on certain of the counts on which each defendant was convicted. Bear in mind that each defendant before us was convicted of conspiracy, mail fraud, securities fraud, and sale of unregistered securities, and a number of those matters would be totally unaffected by the type of misconduct that the defendants assert occurred in the case.

It should also be borne in mind that this jury was both conscientious and discriminating. Two defendants were acquitted entirely; and the two defendants who are here were acquitted on a number of counts. So it is crystal clear that this is not a case, under any circumstances, where any of the alleged conduct poisoned the atmosphere or stampeded the jury.

Two other matters: I have previously found, and I now find, that it is not necessary or appropriate to question any of the other jurors. I am satisfied that I have found the facts from the record already before me, and the record is adequate. Counsel are directed not to contact any other of the jurors, and not

to further disturb or contact these three jurors, all pending further order of the court.

If any counsel feels that this order just pronounced is not within my discretion, I will hear them now.